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No. .....

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In The

# Supreme Court of the United States

October Term, 1984

Della Brown, Conservator of Dan C. Briscoe,
A Protected Person, Petitioner,

v.

United States of America, Respondent.

Della Brown, Conservator of Dan C. Briscoe,
A Protected Person, Petitioner,

v.

Ronald L. Smith; Francis L. Winner; Burl M. Johnson; Larry J. Lopez; Daniel A. Devere; Con L. Shultz; Stephen J. Titus; Thomas S. Morgan; John Siefkes; Gale Shields; Gerald E. Thompson; and Richard Britton, Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Petitioner seeks review of the judgment of the United States Court of Appeals for the Eighth Circuit entered in the consolidated appeals of *Brown v. United States,* No. 83-1234, and *Brown v. Smith, et al.,* No. 83-1242. The issue before the Court of Appeals in both cases was the applicability of the intramilitary immunity doctrine of *Feres v. United States,* 340 U.S. 135 (1950), to bar claims brought against the government and its military personnel for injuries sustained by a black private in the Nebraska Army National Guard as the result of a racially motivated hanging incident. The first question presented for review to this Court is common to both cases, whereas the second question pertains only to the civil rights claim presented in *Brown v. Smith, et al.* Those questions are:

1. Whether the *Feres* doctrine provides immunity to the government and its military officers based upon a finding that military discipline will be impeded if the officers' conduct is litigated in a civil action, notwithstanding a determination that the injured serviceman's activity at the time of the injury was not related to his military service.

2. Whether the *Feres* doctrine applies to actions brought under 42 U.S.C. §§ 1981 and 1983.

## LIST OF PARTIES

The names of all parties in each case are contained in the caption to this Petition.

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Ronald L. Smith; Francis L. Winner; Burl M. Johnson; Larry J. Lopez; Daniel A. Devere; Con L. Shultz; Stephen J. Titus; Thomas S. Morgan; John Siefkes; Gale Shields; Gerald E. Thompson; and Richard Britton, Respondents.

—o—

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Della Brown, Conservator of Dan C. Briscoe, a Protected Person, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cases on July 20, 1984.

## OPINIONS BELOW

The opinion of the Court of Appeals delivered upon the rendering of its judgment in these two cases is reported at *Brown v. United States,* 739 F.2d 362 (8th Cir. 1984), and is set forth in Appendix A to this Petition. Memorandum opinions issued by the United States District Court for the District of Nebraska in connection with its orders granting summary judgment in these cases have not been reported, but are contained in Appendix B to this Petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1984. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

28 U.S.C. § 1346(b)

> Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment,

under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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## STATEMENT OF THE CASE

The petitioner, Della Brown, filed these two actions in the United States District Court for the District of Nebraska on behalf of her son, Dan Briscoe, for whom she has been appointed conservator. Both actions stem from an incident which occurred while Dan Briscoe was participating in National Guard training exercises at Fort Gordon, Georgia, in 1976. Mrs. Brown contends that her son

was the victim of a racially motivated hanging incident, or "mock lynching", perpetrated by fellow guardsmen at an on-base drinking party, and that as a result of this incident Dan Briscoe became emotionally distressed and subsequently attempted suicide, inflicting severe and permanent injuries upon himself.

**District Court Jurisdiction**

Jurisdiction of the District Court was invoked in *Brown v. United States* pursuant to 28 U.S.C. § 1346(b), as involving a claim against the United States under the provisions of the Federal Tort Claims Act. The complaint alleged that the government's employees, the base commander and his permanent party personnel, were negligent in several respects in allowing the hanging incident to occur.

Jurisdiction of the District Court was invoked in *Brown v. Smith, et al.*, pursuant to 28 U.S.C. § 1343 (3) and (4), as involving an action brought to redress the deprivation of due process and equal protection rights provided by the United States Constitution and 42 U.S.C. §§ 1981 and 1983. With respect to the respondents herein, the complaint alleged that Smith, Lopez, Devere, Shultz, Titus and Morgan, all members of the Nebraska Army National Guard, directly participated in the "mock lynching"; that Smith, Winner, Johnson, Lopez, Titus, Siefkes, Shields, Thompson and Britton, as commissioned officers, warrant officers and noncommissioned officers of the Nebraska Army National Guard, failed to take appropriate action to prevent the incident; and that Smith, Shields, Thompson, Winner, Johnson, Siefkes and Britton participated in an attempt to cover up the incident.

## The Rulings Below

Relying on the intramilitary immunity doctrine of *Feres v. United States,* 340 U.S. 135 (1950), the District Court in each case granted the motions for summary judgment filed by all respondents herein. Mrs. Brown thereafter invoked the jurisdiction of the Court of Appeals in each case pursuant to 28 U.S.C. § 1291, and on appeal the cases were consolidated for briefing and submission to the Court.

The Court of Appeals affirmed the judgment of the District Court granting summary judgment in *Brown v. United States,* and affirmed in part the judgment of the District Court in *Brown v. Smith, et al.* To the extent that summary judgment was granted by the District Court in *Brown v. Smith, et al.* to those individuals alleged to have directly participated in the "mock lynching", however, the Court of Appeals reversed and remanded for further proceedings. Mrs. Brown seeks review of the judgment of the Court of Appeals insofar as it affirms the granting of summary judgment in each case.

## The Facts Presented

In its opinion, the Court of Appeals summarized the facts surrounding the hanging incident as follows:

> Dan Briscoe, a black private in the Nebraska Army National Guard, was participating in the federally mandated annual training exercises for guardsmen at Fort Gordon, Georgia. Before the hanging incident, Briscoe was the subject of racial insults, threats, and ridicule by his fellow guardsmen. On one occasion, a miniature hangman's noose, bearing the inscription "KKK," was placed on Briscoe's bunk. On May 31, 1976, while Briscoe was on nonduty status for the

Memorial Day holiday, he attended an afternoon party that members of the Nebraska and Mississippi Army National Guard were having. The party took place outdoors, at a location on the military base between the barracks of the Nebraska and Mississippi guardsmen. Briscoe contends that at this party, several members of the Nebraska and Mississippi Army National Guard, who were intoxicated or under the influence of drugs, led Briscoe to believe that he was being taken by a lynch mob. A noose was placed around Briscoe's neck and he claims that he was raised off the ground. Afterwards, Briscoe returned to his barracks where he overturned several beds, and struck at the barracks wall, putting his hand through a glass window.

* * *

Brown asserts that after the hanging incident, Briscoe entered a period of deep depression. This continued until January 12, 1977, when Briscoe shot himself in the head, inflicting permanent and severe physical and mental damage to himself. Brown claims that her son's attempted suicide was the direct and proximate result of the hanging incident.

(Appendix A, at App. 3-4; *Brown v. United States, supra,* 739 F.2d, at 364.)

**The Findings of The Court of Appeals**

The Court of Appeals employed a two-part analysis to determine whether the *Feres* doctrine was applicable to the facts presented in these cases. The stated considerations were: "(1) whether there is a relevant relationship between the service member's activity and the military service, and (2) whether military discipline will be impeded if the challenged conduct is litigated in a civil action." (Appendix A, at App. 11; *Brown v. United States, supra,* 739 F.2d, at 367.)

Three factors were identified by the Court as bearing on the first consideration: "The duty status of the service member, the location of the injury, and the nature of the activity." (Appendix A, at App. 11; *Brown v. United States, supra,* 739 F.2d at 367.) The Court found that Briscoe's duty status was "not a strong indicator that military immunity should apply" since at the time of the injury he was "off-duty for Memorial Day weekend, no training activities were planned for the weekend, and Briscoe was free to leave the base if he pleased." (Appendix A, at App. 11; *Brown v. United States, supra,* 739 F.2d, at 367.) As to the second factor, the Court held that the fact the injury occurred on a military base "is not alone dispositive." (Appendix A, at App. 12; *Brown v. United States, supra,* 739 F.2d, at 368.) Significantly, the Court found the third factor did not support the application of the *Feres* doctrine here since "[t]he activity in this case—a racially tinged mock hanging of a fellow soldier—served no conceivable or remote military purpose." (Appendix A, at App. 13; *Brown v. United States, supra,* 739 F.2d, at 368.) The Court also noted that in some cases the *Feres* doctrine has been applied "because the service members, at the time of the injury, were enjoying a benefit because of their status as military personnel," but that "[i]n this case, Briscoe, was not at the time of his injury enjoying any benefit peculiar to his status as a member of the military." (Appendix A, at App. 13; *Brown v. United States, supra,* 739 F.2d, at 368.)

Based upon these factors, the Court determined that the relevant relationship between the service member's activity and the military service was lacking in this case. It stated:

> Considering the totality of circumstances in this case, we cannot conclude that there is the necessary relevant relationship between Briscoe's activity at the time of the injury and his military service. Briscoe was injured at a drinking party on a long holiday weekend on which he and the other participants in the incident were free to come and go as they pleased. The activity was not sponsored by the military base nor was it related to the military mission of the base or the National Guard. The mock lynching that occurred bore no relationship to any military purpose; rather, it struck a blow at the desired harmonious relations among the members of the military.

(Appendix A, at App. 13-14; *Brown v. United States, supra,* 739 F.2d, at 368.)

Although it failed to find a relevant relationship between Briscoe's activity at the time of the injury and his military service, the Court of Appeals nonetheless continued with its analysis to determine whether military discipline will be impeded if the challenged conduct is litigated in these lawsuits. It found such to be the case with regard to the claim presented in *Brown v. United States* that the base commander and his permanent party personnel were negligent in allowing the hanging incident to occur, and also with regard to the claims in *Brown v. Smith, et al.,* that certain of Briscoe's military superiors failed to take appropriate action to prevent the incident, and that some of these same individuals participated in an attempt to cover up the incident. These claims the Court of Appeals held were barred by the *Feres* doctrine. However, the remaining claim presented in *Brown v. Smith, et al.,* that six of the guardsmen directly participated in the hanging incident, was held not to pose a problem to military discipline if litigated since the challenged conduct did not involve the command relation-

ship nor military decision making. The Court of Appeals remanded this claim for further proceedings.

In making its determination that two of the claims presented in *Brown v. Smith, et al.* could not be maintained, the Court of Appeals was also required to find that an action brought under 42 U.S.C. §§ 1981 and 1983 is subject to the *Feres* doctrine.

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## REASONS FOR GRANTING THE WRIT

### I.

**The Court of Appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.**

The holding of the Court of Appeals in these cases that the *Feres* doctrine applies if the wrongdoer's conduct was related to military discipline, even though the injured serviceman's activity was not service-related, is directly contrary to the holding of the United States Court of Appeals for the Third Circuit in the recent decision of *Shearer v. United States,* 723 F.2d 1102, *reh'g denied,* 729 F.2d 266 (3rd Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3116 (U.S. July 2, 1984) (No. 84-194). In that case a serviceman had been kidnapped and murdered by a fellow soldier while both men were off-duty and away from the base. The victim's mother brought suit against the United States under the Federal Tort Claims Act, alleging that the Army had been negligent in allowing the soldier committing the murder to remain in the service since he had a known record of violence. Relying on the *Feres*

doctrine, the district court granted the government's motion for summary judgment. The Court of Appeals reversed, stating:

> The district court's error stems from its singular focus on the status and activity of the allegedly negligent parties (i.e. Heard's superior officers) without considering the status and activity of the injured party. Consequently, the district court improperly concluded that appellant's "allegations relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore are barred." App. at 25a.
>
> In support of its conclusion, the district court erroneously relied on *Johnson v. U.S.*, 631 F.2d 34, 36-37 (5th Cir. 1980) and *Henning v. U.S.*, 446 F.2d 774, 777 (3d Cir. 1971). These two cases did not adopt a tortfeasor status-activity analysis as the lower court suggested. Instead these cases merely restated a basic *Feres* doctrine rule: Malpractice to an active duty soldier in an army hospital is, by its very nature, considered activity "incident to military service," and therefore barred under *Feres*. [footnote omitted] Both *Johnson* and *Henning* concerned injuries to servicemen allegedly stemming from their medical treatment in Army hospitals. Although receiving medical treatment in military hospitals may be considered an activity and benefit "incident to military service" and therefore barred under *Feres*, certainly being kidnapped off base at gun point can never be perceived as one of the activities or anticipated free benefits of being in the armed services. Thus, there is no legitimate basis on which *Feres* can bar appellant's claim.

*Shearer v. United States, supra,* 723 F.2d, at 1106.

The "torfeasor status-activity analysis" of the *Feres* doctrine, rejected in the Third Circuit in *Shearer,* clearly has been adopted in the Eighth Circuit in the opinion delivered in the present cases. A split of authority there-

fore exists over whose "activity" is considered relevant in applying the "incident to service" test announced by this Court in *Feres*. Under that test, immunity from liability exists "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States, supra,* 340 U.S., at 146. Petitioner submits that the Third Circuit view is correct, and she respectfully requests this Court to clarify the "incident to service" test by holding that the "activity" referred to therein is that of the injured serviceman, and not that of his military superiors.

## II.

### The Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

In *Chappell v. Wallace,* — U.S. —, 103 S. Ct. 2362 (1983), this Court held that the *Feres* doctrine applies to claims brought directly under the Constitution in the manner of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). Not decided by this Court in *Chappell,* however, was the question of whether the *Feres* doctrine applies to claims brought under a federal civil rights statute. *Chappell v. Wallace, supra,* 103 S. Ct., at 2368 n.3.

This question has now been answered in the affirmative by the United States Court of Appeals for the Eighth Circuit, as it simply stated in its opinion:

> We are unable to find, however, a reasoned distinction for the purposes of the *Feres* doctrine between *Bivens*-type actions under the Constitution and actions brought under a federal civil rights statute. We cannot say that the policies supporting the civil rights

> statutes are any stronger than those supporting constitutional rights; nor can we say that military discipline will be any less affected by a civil rights claim than a constitutional claim. Hence, we reject Brown's argument that the *Feres* doctrine can never be a bar to a suit brought under 42 U.S.C. §§ 1981 and 1983.

(Appendix A, at App. 10; *Brown v. United States, supra,* 739 F.2d, at 367.)

The foregoing analysis of this issue by the Court of Appeals does not adequately address the pivotal question —namely, whether Congress intended to exclude intramilitary suits from the types of actions authorized by 42 U.S.C. § 1983. By treating civil rights claims and constitutional claims as equivalent causes of actions, the Court has ignored a fundamental distinction. A *Bivens*-type action to redress a violation of constitutional rights cannot be maintained if there are "any special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* 403 U.S., at 396. But a civil rights action is maintainable precisely because of the affirmative action taken by Congress in enacting the federal civil rights statutes, and it is therefore neither necessary nor appropriate to consider whether "special factors" impinge upon the remedy fashioned by Congress. The only relevant inquiry is whether Congress intended the statutory remedy to encompass the present action.

Congressional intent was also the issue presented in *Feres.* It must be noted, however, that Congress did not create any new causes of action by enacting the Federal Tort Claims Act, but merely waived government immunity from recognized causes of action. *Feres v. United States, supra,* 340 U.S., at 141-42. The civil rights claim pre-

sented in *Brown v. Smith, et al.* does involve a new cause of action created by Congress, and consequently this is a "wholly different case" from *Feres.*

This Court has determined, of course, that Congress did not intend the general language of 42 U.S.C. § 1983 to abrogate immunities recognized at common law. *Imbler v. Pachtman,* 424 U.S. 409, 417-18 (1976). At common law, however, a military officer does not enjoy absolute immunity from suit by his subordinates. The officer "is not to be shielded from responsibility, if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends." *Wilkes v. Dinsman,* 48 U.S. 55, 57, 7 How. 89, 123 (1848). Enlisted personnel, such as the respondents Devere, Shultz and Morgan, do not possess even a qualified immunity at common law.

Petitioner respectfully submits that the Court of Appeals has engrafted new immunities onto 42 U.S.C. §§ 1981 and 1983, contrary to the intent of Congress, and that the applicability of the *Feres* doctrine to civil rights claims is, in any event, an issue deserving of more careful consideration than that evidenced by the opinion of the Court of Appeals.

## CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted to resolve the conflict which exists in the decisions of the federal courts of appeals

over the proper interpretation of the *Feres* doctrine, and, in the event that issue is decided adversely to petitioner, to settle the important question of federal law of whether the *Feres* doctrine applies to civil rights actions.

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 83-1234

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Della Brown, Conservator of Dan C. Briscoe, A Protected Person,

Appellant,

v.

United States of America,

Appellee.

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No. 83-1242

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Della Brown, Conservator of Dan C. Briscoe, A Protected Person,

Appellant,

v.

Ronald L. Smith; Francis L. Winner; Burl M. Johnson; Larry J. Lopez; Daniel A. Devere; Con L. Shultz; Stephen J. Titus; and Thomas S. Morgan, John Siefkes, Gale Shields, Gerald E. Thompson and Richard Britton,

Appellees.

Appeals from the United States District Court for the District of Nebraska

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Submitted: October 10, 1983
Filed: July 20, 1984

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Before BRIGHT, John R. GIBSON and FAGG, Circuit Judges.

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FAGG, Circuit Judge.

Dan Briscoe claims that he was the victim of a racially motivated hanging incident, a "mock lynching," that occurred while he was participating in National Guard training exercises. Briscoe's mother and conservator, Della Brown, alleges that as a result of this mock lynching, Briscoe entered into a deep mental depression, culminating in a suicide attempt in which he was severely and permanently injured. Brown brought an action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, to recover for injuries sustained by Briscoe as a result of the hanging incident. Brown also brought an action against several individuals for the violation of Briscoe's civil rights under 42 U.S.C. §§ 1981 and 1983 and for the violation of Briscoe's federal constitutional rights under the due process and equal protection clauses. The district court granted the defendants' motions for summary judgment in both actions, relying upon the doctrine of military immunity in *Feres v. United States*, 340 U.S. 135 (1950).

Under the *Feres* doctrine, the United States and its military personnel are not liable for injuries to service members that are incident to their military service. The sole issue in this appeal is whether Briscoe's injury was incident to his military service. After considering the relevant cases of the Supreme Court and this and other circuits, we conclude that Briscoe's claim against the participants in the hanging incident is not barred by the *Feres* doctrine. We also hold that Briscoe's claims

against the United States and his superior officers for failing to prevent the incident, and against his superior officers for failing to prevent the incident, and against his superior officers for later failing to perform an adequate investigation of the incident, impinge upon the unique military disciplinary structure and are barred by the *Feres* doctrine.

I. Background

Dan Briscoe, a black private in the Nebraska Army National Guard, was participating in the federally mandated annual training exercises for guardsmen at Fort Gordon, Georgia. Before the hanging incident, Briscoe was the subject of racial insults, threats, and ridicule by his fellow guardsmen. On one occasion, a miniature hangman's noose, bearing the inscription "KKK," was placed on Briscoe's bunk. On May 31, 1976, while Briscoe was on nonduty status for the Memorial Day holiday, he attended an afternoon party that members of the Nebraska and Mississippi Army National Guard were having. The party took place outdoors, at a location on the military base between the barracks of the Nebraska and Mississippi guardsmen. Briscoe contends that at this party, several members of the Nebraska and Mississippi Army National Guard, who were intoxicated or under the influence of drugs, led Briscoe to believe that he was being taken by a lynch mob. A noose was placed around Briscoe's neck and he claims that he was raised off the ground. Afterwards, Briscoe returned to his barracks where he overturned several beds, and struck at the barracks walls, putting his hand through a glass window.

Following the hanging incident, an investigation was conducted by the National Guard. Captain Richard

Stackhouse conducted interviews and took sworn statements from all of the persons involved in the incident. Captain Stackhouse concluded that the mock hanging took place at a party with excessive drinking, that it was a crude, ill-advised prank, but without intent of bodily harm, and that Briscoe participated in the prank voluntarily and remained at the party drinking after the incident. Briscoe initially indicated that he was not interested in making any formal complaint, but he was interested in his pay, his medical benefits, and talking with a race relations officer, all of which received prompt attention.

Brown asserts that after the hanging incident, Briscoe entered a period of deep depression. This continued until January 12, 1977, when Briscoe shot himself in the head, inflicting permanent and severe physical and mental damage to himself. Brown claims that her son's attempted suicide was the direct and proximate result of the hanging incident.

Brown argues that the United States is liable in the tort claims action because its employees, the base commander and his permanent party personnel, were negligent in allowing the hanging incident to occur. With respect to the civil rights action, Brown contends that individual defendants Smith, Lopez, Devere, Shultz, Titus, and Morgan, all noncommissioned officers in Briscoe's military unit, are liable because of their direct participation in the hanging incident. Additionally, Brown contends that various superior officers failed to recognize and correct the racial problems that led to the incident, failed to provide adequate supervision of the National Guard

members while on annual training exercises, and purposefully failed to investigate the incident.

II. The *Feres* Doctrine

The Federal Tort Claims Act of 1946, 28 U.S.C. § 2671 *et seq.*, waived the traditional immunity from suit of the United States in its sovereign capacity. The FTCA provides for federal jurisdiction of claims against the United States for injuries negligently caused by government employees acting within the scope of their employment, if a private person would be liable under the same circumstances. In a series of decisions now known as the *Feres* doctrine, the Supreme Court established a judicially created exception to the waiver of sovereign immunity in the FTCA, holding that the United States is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to military service. *See United States v. Brown,* 348 U.S. 110 (1954); *Feres v. United States,* 340 U.S. 135 (1950); *Brooks v. United States,* 337 U.S. 49 (1948).

Three rationales are generally offered for the *Feres* principle of military immunity: (1) the "distinctly federal" relationship between the United States and its service personnel; (2) the presence of an alternative compensation system; and (3) the fear of disrupting the military disciplinary structure. *See Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 671-72 (1977). Recent court decisions have tended not to emphasize the first two rationales for the *Feres* doctrine.

The first of the *Feres* rationales is premised on the idea that "it would make little sense to have the Govern-

ment's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury." *Stencel Aero Engineering Corp. v. United States, supra,* 431 U.S. at 671. As the Ninth Circuit has recently noted, however, "[t]he argument that the military relationship is distinctly federal applies with equal force to other federal agencies that are liable under the FTCA." *Johnson v. United States,* 704 F.2d 1431, 1435 (9th Cir. 1983). Thus, this does not appear to be a strong basis for the *Feres* doctrine.

The second *Feres* rationale refers to the Veterans Benefit Act, which establishes, as a substitute for tort liability, a statutory scheme providing pensions for injured servicemen without regard to any negligence on the part of the government. As to the alternative compensation system, another circuit has made the observation that "given the Supreme Court's inconsistent treatment of this factor, it cannot be said that the presence of an alternative compensation system either explains or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable." *Hunt v. United States,* 636 F.2d 580, 598 (D.C. Cir. 1980).

The most compelling rationale for the *Feres* doctrine clearly is the potential effect of civil suits on the military disciplinary structure. *See Mondelli v. United States,* 711 F.2d 567, 568-69 n.5 (3d Cir. 1983), *cert. denied,* 104 S. Ct. 1272 (1984); *Johnson v. United States, supra,* 704 F.2d at 1436; *Scales v. United States,* 685 F.2d 970, 972-73 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 1772 (1983); *Hunt v. United States, supra,* 636 F.2d at 599. As the Supreme Court has explained:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.

*United States v. Brown, supra,* 348 U.S. at 112. The Court emphasized this factor in its recent opinion, *Chappell v. Wallace,* 103 S. Ct. 2362 (1983). In that opinion, the Court stressed the unique military need for discipline and obedience to orders, not only on the battlefield, but in training as well. *Id.* at 2365. "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." *Id.*

Although the *Feres* doctrine has often been criticized, "it is beyond question that it is the law." *Laswell v. Brown,* 683 F.2d 261, 265 (8th Cir. 1982). The Supreme Court has recently reaffirmed the validity of the doctrine in *Chappell v. Wallace, supra,* 103 S. Ct. at 2362, and in *Stencel Aero Engineering Corp. v. United States, supra,* 431 U.S. at 666. This court has given the *Feres* doctrine "a rather broad construction." *Miller v. United States,* 643 F.2d 481, 491 (8th Cir. 1981) (en banc). Although *Feres* dealt with suits against the United States under the FTCA, the *Feres* doctrine has been extended to immunize military defendants in their individual capacities. *See, e.g., Hass v. United States,* 518 F.2d 1138, 1143 (4th

Cir. 1975); *Bailey v. DeQuevedo,* 375 F.2d 72, 73-74 (3d Cir. 1967). *See also Chappell v. Wallace, supra,* 103 S. Ct. at 2364 (suit against individual military officers); *Feres v. United States, supra,* 340 U.S. at 141. The *Feres* doctrine is also applicable to members of the National Guard. *Anderson v. United States,* 724 F.2d 608, 610 (8th Cir. 1983).

In *Miller v. United States, supra,* 643 F.2d at 481, a serviceman died while working during off-duty hours for a private construction firm building on-base residential housing. Miller's death occurred when an aluminum ladder with which he was working came in contact with an uninsulated electric wire owned and controlled by the United States. Miller sued the United States for various negligent acts, including the failure to de-energize the electric wire. In an *en banc* opinion, this court concluded that "[t]he whole situation arose out of life on a military post" and thus held that the injury was incident to service. *Id.* at 495. The "key point," the court said, was that Miller "was always subject to call for active duty, and that the immediacy of his peculiar and special relationship to his military superiors had not been severed by any such formality as a furlough, leave, or pass." *Id.* at 494. Another consideration in *Miller* was that "the work he was doing, though not under the immediate supervision of his military superiors, was related to the military mission of the base." *Id.*

Importantly, the *en banc* court in *Miller* stated that "[w]e need not and do not hold that every action for injuries sustained by an active duty serviceman while on base is barred by *Feres.*" Instead of adopting such a *per*

*se* rule, the court adopted a flexible approach to the *Feres* doctrine, dependent upon the circumstances in each case:

> [W]e analyze the reasons given for the rule laid down by the Supreme Court in *Feres* and consider whether these reasons apply to the undisputed facts of the instant case. While a *per se* rule * * * has the virtue of easy application, *the better jurisprudential course, in our view, is to examine the facts of each case as they arise and determine whether they fall within the reasons given by the Supreme Court for its conclusion in* Feres.

*Id.* at 493 (emphasis added). Various factors emphasized in the Eighth Circuit decisions, such as whether the service member was subject to duty, whether the injury arose out of life on a military base, and what the service member was actually doing at the time of the injury, must inform the decision of whether the injury was incident to service. Such factors, however, are merely guidelines for determining whether the policy rationales of *Feres* will be fulfilled by the application of the doctrine in the individual case.

III. Analysis

At the outset, we must respond to Brown's argument that regardless of the effect the *Feres* doctrine has on the FTCA claim, it does not apply with respect to the civil rights claim under 42 U.S.C. §§ 1981 and 1983. In *Chappell v. Wallace, supra,* 103 S. Ct. at 2362, the Supreme Court considered a similar question—whether enlisted military personnel could maintain an action to recover damages from superior officers for injuries sustained as a result of violations of constitutional rights in the course of their military service. The Court held that the *Feres*

doctrine applied to bar a claim brought directly under the Constitution pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). In a footnote, the Court noted that it did not decide the issue of whether an action could be maintained under 42 U.S.C. § 1985(3). *Chappell v. Wallace, supra,* 103 S. Ct. at 2368 n.3. Thus, the Supreme Court in *Chappell* left open the question of whether the *Feres* doctrine applied to an action brought under a federal civil rights statute. We are unable to find, however, a reasoned distinction for the purposes of the *Feres* doctrine between *Bivens*-type actions under the Constitution and actions brought under a federal civil rights statute. We cannot say that the policies supporting the civil rights statutes are any stronger than those supporting constitutional rights; nor can we say that military discipline will be any less affected by a civil rights claim than a constitutional claim. Hence, we reject Brown's argument that the *Feres* doctrine can never be a bar to a suit brought under 42 U.S.C. §§ 1981 and 1983.

Although the Eighth Circuit has given *Feres* a broad construction, we believe that this case presents a unique factual situation that is not directly controlled by any of our previous decisions. The extreme nature of the alleged conduct and its total antipathy to any conceivable military purpose sets this apart from our earlier decisions. Consistent with *Miller,* however, we will employ a flexible analysis to determine whether the facts in this case fall within the reasons given by the Supreme Court for its principle of military immunity in *Feres.* Granting that this court has not developed a comprehensive test to determine whether *Feres* should bar a claim, it will be use-

ful to outline various factors that should usually be considered in determining whether an activity is incident to service. *See Johnson v. United States, supra,* 704 F.2d at 1436-41; *Parker v. United States,* 611 F.2d 1007, 1013-15 (5th Cir. 1980). We believe that our analysis can be broken down into two parts: (1) whether there is a revelant relationship between the service member's activity and the military service, and (2) whether military discipline will be impeded if the challenged conduct is litigated in a civil action.

A. Relationship Between Service Member's Activity and Military Service

To determine whether a relevant relationship exists between the service membber's activity and the military service, we focus our attention on three factors that our court has considered important: the duty status of the service member, the location of the injury, and the nature of the activity.

1. Duty Status

In previous Eighth Circuit decisions, the duty status of the service member at the time of the injury has been an important consideration in the analysis. *See Miller v. United States, supra,* 643 F.2d at 494. *See also Laswell v. Brown, supra,* 683 F.2d at 261. When the injury occurred in this case, Briscoe was off-duty for Memorial Day weekend, no training activities were planned for the weekend, and Briscoe was free to leave the base if he pleased. Thus, although Briscoe was not on furlough, this is not as strong a case for the application of *Feres* as those in which a service member was merely off-duty for the day. In a meaningful way, Briscoe's status was akin to

that of a service member on pass. *See Johnson v. United States, supra,* 704 F.2d at 1438 n.3. Under the circumstances, this factor is not a strong indicator that military immunity should apply.

2. Location of the Injury

The location of the injury has been considered significant by many courts under the incident to service test. Indeed, one court has observed that it appears "fairly well established" that if the injury occurs on a military base, recovery is automatically barred under *Feres. Troglia v. United States,* 602 F.2d 1334, 1337 (9th Cir. 1979). Although Eighth Circuit cases have tended toward denying recovery in cases in which the injury occurs on a military base, there is no hard and fast rule to this effect. *See Miller v. United States, supra,* 643 F.2d at 493, 494, 495; *Chambers v. United States,* 357 F.2d 224, 229 (8th Cir. 1966). We feel that such a rigid test is in part a "substitute for analysis of whether the serviceman was injured in an activity incident to his service in the military." *Troglia v. United States, supra,* 602 F.2d at 1338. We believe that the location of the injury, which in this case occurred on a military base, is one of the factors to be considered, but it is not alone dispositive.

3. Nature of the Activity

If our inquiry is truly to determine whether the policy reasons underlying *Feres* will be fulfilled by the application of military immunity in a particular case, we must examine "what the serviceperson was actually doing at the time of the injury." *See Miller v. United States, supra,* 643 F.2d at 497 (Heaney, J., dissenting). Thus, if we are to adhere "to the line drawn in the *Feres* case be-

tween injuries that did and injuries that did not arise out of or in the course of military duty," *United States v. Brown, supra,* 348 U.S. at 113, we must consider whether the activity out of which the action arose served some military purpose or mission. *See Johnson v. United States, supra,* 704 F.2d at 1439; *Miller v. United States, supra,* 643 F.2d at 494; *Parker v. United States, supra,* 611 F.2d at 1014. The activity in this case—a racially tinged mock hanging of a fellow soldier—served no conceivable or remote military purpose.

4. Conclusion

In most cases, these three factors will determine whether there is a relevant relationship between the servic member's activity at the time of the injury and the military service. However, we observe that there is a special category of cases in which the *Feres* rule has been applied because the service members, at the time of the injury, were enjoying a benefit because of their status as military personnel. *See Johnson v. United Statse, supra,* 704 F.2d at 1438. Frequently, the benefit is of a recreational nature such as in *Chambers v. United States, supra,* 357 F.2d at 224, in which a serviceman injured while swimming in an on-base pool was denied relief. Also in this category are suits by service members for medical malpractice, which have generally been barred. *See Feres v. United States, supra,* 340 U.S. at 135; *Alexander v. United States,* 500 F.2d 1 (8th Cir. 1974), *cert. denied,* 419 U.S. 1107 (1975). In this case, Briscoe was not at the time of his injury enjoying any benefit peculiar to his status as a member of the military.

Considering the totality of circumstances in this case, we cannot conclude that there is the necessary relevant

relationship between Briscoe's activity at the time of the injury and his military service. Briscoe was injured at a drinking party on a long holiday weekend on which he and the other participants in the incident were free to come and go as they pleased. The activity was not sponsored by the military base nor was it related to the military mission of the base or the National Guard. The mock lynching that occurred bore no relationship to any military purpose; rather, it struck a blow at the desired harmonious relations among the members of the military. Thus, we must now consider whether military discipline will be impeded if the challenged conduct is litigated in these lawsuits.

B. Effect on Military Discipline

As we have already observed, the preservation of military discipline is at the heart of the *Feres* doctrine. Courts have repeatedly recognized the importance of "[t]he peculiar and special relationship of the soldier to his superiors." *See United States v. Brown, supra,* 348 U.S. at 112. *See also United States v. Carroll,* 369 F.2d 618, 621 (8th Cir. 1966). The Supreme Court has recently observed that "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined" if military officers are exposed "to personal liability at the hands of those they are charged to command." *Chappell v. Wallace, supra,* 103 S. Ct. at 2367. The deference of courts to military judgment is based on the concern that "[m]ilitary decisionmakers might not be willing to act as quickly and forcefully as is necessary, especially during battlefield conditions, if they know they will subsequently be called into a civilian court to answer for their actions." *Jaffee v. United States,* 663 F.2d 1226, 1232 (3d Cir. 1981).

In this case, the claims against the various defendants can be placed in three categories: (1) the failure to prevent the hanging incident, (2) the actual participation by certain defendants in the hanging incident, and (3) the failure to perform a proper investigation of the incident. We believe that if the first and third of these claims were litigated, there would be a damaging effect on the military disciplinary structure.

The claim that various officers negligently failed to prevent the incident directly calls into question the disciplinary decisions of Briscoe's superior officers. Presumably what would be litigated is whether the officers should have issued some type of order, or otherwise taken disciplinary action, to prevent any type of racially motivated actions. Under the *Feres* doctrine such a lawsuit cannot be maintained--it strikes percisely at the type of command relationship between a service member and his or her superior officers that is at the heart of the military disciplinary structure. Similarly, the claim that various officers failed to perform a proper investigation strikes directly at military decisionmaking with respect to a disciplinary matter. The *Feres* doctrine will not permit a court to second-guess the military decisions as to how an investigation into a disciplinary matter should have been conducted. *See Miller v. United States, supra,* 643 F.2d at 494.

We must next consider the claim against the participants in the hanging incident under 42 U.S.C. §§ 1981 and 1983. Unlike the other two claims, this claim does not involve the command relationship between a service member and his or her superiors, nor does it involve military decisionmaking with respect to disciplinary matters. There

is no indication that a superior officer ordered anyone to participate in this offensive incident, so the concern for immediate compliance with military orders and procedures is not implicated. The activity that is at issue in this claim is of a distinctly non-military nature: the alleged participation of a group of men at a holiday weekend drinking party in the mock lynching of a young black man. The primary purpose of the *Feres* doctrine—the maintenance of the military disciplinary structure—could hardly be furthered by the application of military immunity for the participants in this incident. Indeed, the application of the *Feres* doctrine in a case such as this would insulate from liability the very breakdown of military discipline. Thus, the defendants who participated in the hanging incident are not entitled to a dismissal of this lawsuit under the *Feres* doctrine.

Finally, we observe that it is unclear to what extent the Nebraska guardsmen actually participated in the hanging incident. Briscoe's own statements suggest that it was only the Mississippi guardsmen, not the Nebraska guardsmen, who participated in the incident. The Mississippi guardsmen are not defendants in this suit. Additionally, the unanswered affidavits of the Nebraska guardsmen deny that they participated in the incident, other than as bystanders. In any event, this is a matter that seems ripe for consideration by the district court on remand.

In conclusion, then, we find that Briscoe's claim against the participants in the affair is not barred by the *Feres* doctrine. We find, however, that Briscoe's claims against the United States and his superior officers for failing to prevent the incident, and against his superior

officers for failing to perform a proper investigation, are barred by the *Feres* doctrine. Thus, the judgment of the district court granting summary judgment in favor of those alleged to have participated in the incident—Smith, Lopez, Devere, Schultz (sic), Titus, and Morgan—is reversed and remanded for further proceedings consistent with this opinion. The judgment of the district court granting summary judgment in favor of all the other defendants is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DELLA BROWN, Conservator of DAN C. BRISCOE, a protected person,

Plaintiff,

vs.

RONALD L. SMITH, et al.,

Defendants.

MEMORANDUM

(Filed February 19, 1981)

CV7-L-99

The defendants Smith, Winner, Johnson, Siefkes, Shields, Thompson, Britton, Lopez, Devere, Shultz, Titus, Morgan, Stackhouse, and Lesson (sic) have moved in filing 66 for reconsideration of the court's ruling on filing 25 —their motion to dismiss for improper venue pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure. I take it from filing 71 that the defendant Makarski is requesting the court to reconsider the ruling on his motion, filing 43, as well. He has filed an affidavit of residency, even though he was not one of the defendants given time to do so in filing 67 or included in the request for reconsideration in filing 66.

In filing 65 a ruling on the alternative motion of the defendants Shields, Siefkes, Thompson and Britton, filing 57, was held in abeyance until further briefs and materials could be offered. Another motion for summary judgment, filing 68, was filed by these same defendants on June 10, 1980.

I consider first the motion to dismiss for lack of proper venue. I held in my memorandum of May 12, 1980, that the burden of proof rests with the defendants contesting the propriety of venue based upon their residences. The moving defendants were given an opportunity to present evidence on their motion, and the plaintiff has not rebutted the defendants' affidavits contained in filing 71.

The defendants Makarski, Lesson (sic) and Stackhouse have submitted affidavits of similar effect. Each states that the affiant was domiciled in a state other than Nebraska as of April 2, 1979—the date this action was commenced—and since that date has not resided in Nebraska at any time. I am satisfied that in conjunction with the inferences noted in my memorandum of May 12, 1980, that the affidavits demonstrate venue in this district to be improper with respect to these three defendants on the basis of their residences. See 28 U.S.C. § 1391(b).

I turn now to a consideration of whether venue may be proper as to the defendants Leeson, Stackhouse and Makarski under the second alternative factor set forth in § 1391(b). Venue is proper in this district under the second factor if the claim arose in the State of Nebraska. I noted in the memorandum of May 12, 1980, my inclination to hold that the plaintiff's claims arose not in Nebraska, but in Georgia. Further thought and analysis confirm my original inclination.

The Supreme Court of the United States in *LeRoy v. Great Western United Corp.*, 443 U.S. 173 (1979), interpreted the second factor of 28 U.S.C. § 1391(b) in the context of a constitutional challenge to the statutes of three states. The court noted that the similarity among the

constitutional claims against the states and the convenience of the plaintiff are not statutorily authorized justifications for a plaintiff's choice of forum. *Id.*, at 183. The court continued:

> "In most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial. For that reason, Congress has generally not made the residence of the plaintiff a basis for venue in nondiversity of cases. . . ."
> 443 U.S. at 183-184

The court sanctioned a narrow reading of the second factor in § 1391(b), stating:

> "So long as the plain language of the statute does not open the severe type of 'venue gap' that the amendment giving plaintiffs the right to proceed in the district where the claim arose was designed to close, there is no reason to read it more broadly on behalf of the plaintiffs."
> 443 U.S. at 184

Noting that the determination of where the claim arose is a federal question to be determined by applying federal law, the Supreme Court then rejected the view taken by the Court of Appeals for the Fifth Circuit, 443 U.S. at 184; the court rejected the view that the place where the defendants' acts impacted upon the plaintiff is the place where the claim arose. 443 U.S. at 186.

The language quoted by the court in *LeRoy* at 185 indicates that the convenience of the litigants and witnesses and, perhaps, the location of relevant evidence were the relevant considerations in broadening § 1391(b) to include the place where the claim arose. In the usual case, therefore, under the approach taken in *LeRoy* there will be

"only one obvious locus." In expanding upon this interpretation the court looked to the place where the defendants' actions occurred and concluded that *LeRoy* was not an unusual case.

However, the Supreme Court in *LeRoy* went on to give an indication of the outer limits of venue under the second factor in § 1391(b):

> " . . . . In our view, therefore, the broadest interpretation of the language of § 1391(b) that is even arguably acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district, a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility—in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but *not* of the plaintiff)—may be assigned as the focus of the claim. . . . "
>
> 443 U.S. at 185

I do not consider the venue question a close one with respect to the defendants Stackhouse, Leeson and Makarski. The complaint charges them predominantly with acts and omissions in Georgia and perhaps Mississippi at or near the time of the mock hanging incident, which acts and omissions allegedly caused Briscoe's injuries. The injuries were manifested both in Georgia and Nebraska; the alleged acts and ommissions by the defendants in Nebraska are largely incidental to those occurring in Georgia. Accordingly, venue does not lie in the District of Nebraska as to the defendants Makarski, Leeson and Stackhouse. Judgment will be entered dismissing the action against only these defendants, however. Where venue is proper with respect to some but not all defendants, those defendants for which venue is improper should

be dismissed upon their motion. See *Fuente v. Interstate Commerce Commission,* 451 F.Supp. 867, 871 (U.S.D.C. N.D. Ill. 1978); see, generally *Camp v. Gress,* 250 U.S. 308, 311-316 (1919). It is not contended by the other moving defendants that Makarski, Leeson and Stackhouse are indispensable parties.

I move now to consideration of the motions of the defendants Shields, Siefkes, Thompson and Britton for summary judgment, filing 57, as supplemented by filing 68. The plaintiff was given until October 1, 1980, to respond, and the plaintiff has advised the court by a letter dated October 2, 1980, that she elects to stand on her previously submitted brief. The plaintiff has submitted no affidavits in opposition to the motion for summary judgment.

The following facts appear to be undisputed at this time: That while Dan Briscoe, a Negro, was a member of the Nebraska Army National Guard he was the subject of a mock hanging incident in which a rope was placed around his neck; that the incident occurred while Briscoe was a participant in a federally mandated annual training exercise at Fort Gordon, Georgia; that Briscoe had previously been the subject of some racially motivated insults or jokes during the period of the training exercises; that after the incident Briscoe returned to his barracks and overturned several beds, struck at the barracks and put his hand through a window, resulting in his hospitalization; that the mock hanging and injuries to Briscoe's arm occurred on May 31, 1976, while he was on nonduty status; that he was not restricted as to travel or activities at that time; that Briscoe and the other guardsmen were off duty on May 31, 1976, due to the observance of the

Memorial Day holiday; that Briscoe was not on leave status at the time of the incidents; and that the mock hanging and other incidents occurred on the Fort Gordon premises and the mock hanging occurred outside one of the unit barracks on the base during a party at which alcoholic beverages were served and were consumed by the plaintiff and others, according to the affidavits on file. There are discrepancies as to the amount of pressure which was allowed to be put on Briscoe's neck during the mock hanging and as to whether Briscoe participated voluntarily or was coerced in some manner to participate in the mock hanging.

The basis for the defendants' motion is the doctrine of *Feres v. United States,* 340 U.S. 135 (1950, which bars recovery by servicemen for injuries sustained as the result of activities which are incident to military service. I shall not repeat the discussion of the *Feres* doctrine contained in my memorandum of May 12, 1980. However, I shall discuss the effect of the intervening opinion of the Court of Appeals for the Eighth Circuit in *Miller v. United States,* — F.2d —, No. 79-1964 (August 28, 1980), which reversed and remanded for further proceedings the summary judgment granted by the district court based upon application of the *Feres* doctrine.

Count one of the complaint alleges that the four movants "were aware of the incidents perpetrated upon Dan C. Briscoe solely because of his race or color that caused him to believe his life was in danger but did nothing to remedy the situation" thereby causing Briscoe to fear for his life and to enter into a period of depression and emotional distress. Count two alleges that the movants, after the hanging incident, had a duty to investigate the inci-

dent and purposefully took no action to do so, falsified documents, withheld information from Briscoe and the public, and overtly attempted to cover up the incident, thereby causing Briscoe extreme emotional distress, fear for his life, and deep depression, all of which compelled Brisco to attempt suicide. The movants have submitted affidavits detailing their knowledge of, and their actions surrounding and investigative efforts into, the circumstances of the mock hanging incident. Also, they have submitted copies of signed statements by witnesses to the incidents.

In *Miller v. United States,* supra, the executors of the estate of the decedent brought an action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq., for damages sustained when the decedent was electrocuted after an aluminum ladder he was holding hit an electrical power line. The decedent, a serviceman, had completed his military duties for the day and was working on the military base in a civilian capacity for a private contractor. The work was done with the permission and knowledge of his superior officer. The district court granted summary judgment for the defendant based upon the *Feres* doctrine, holding that the injuries arose out of activities incident to military service. The Court of Appeals for the Eighth Circuit concluded that the injuries were not related to or dependent upon military service and reversed the district court.

In Miller the circuit court summarized the holdings of several *Feres* doctrine cases as follows:

> "Deciding whether to apply *Feres* or *Brooks* in any given situation is not an easy task. Defining 'incident to service' is the key, but the Supreme Court

has never fully defined the term. As a result, the lower courts have developed guidelines for determining whether an activity is incident to service. Generally, the *Feres* doctrine applies if the incident occurs(1) on a military base, *or* (2) while the serviceman is on active duty status, *or* (3) under compulsion of military orders or on a military mission or directly subject to military control, *or* (4) the activity is a privilege related to or dependent upon military status. The Brooks doctrine is the converse of the *Feres* doctrine and applies if the accident occurs while the serviceman is (1) off the military base, and (2) on leave or furlough, *and* (3) not under compulsion of military orders or on a military mission or directly subject to military control, and (4) the activity is not a privilege dependent upon military status.

"The use of the conjunctions 'and' and 'or' in the two tests is pertinent. Under the *Feres* rule, any one factor has been sufficient to bar the claim, but under the *Brooks* rule, it has generally been necessary to find that all the factors are present before a serviceman can proceed with his claim. This test is understandable for the third and fourth factors because if either factor is present, the activity is necessarily incident to military service. But, blind application of this test for the first two factors is of questionable validity and represents only the most superficial analysis. The facts of each case must be carefully analyzed, and the first two factors should be considerations only, not determinative factors.

"Nevertheless, the majority of decided cases indicate that if he is either on active duty status or on base, *Feres* automatically applies, and if he is not on active duty status and off base, *Feres* may or may not apply depending upon what he is doing at the time of injury. If either factor is present, an irrebuttable presumption is raised that the injury arose out of activities incident to military service. The rationale is that if he is on active duty status or on the base,

> he is presumably subject to military control. He can be recalled for duty at any time and is subject to the possibility of immediate orders. . . ."
>
> *Miller v. United States,* supra, slip opinion at pp. 7-10.

The court, after determining that several of the earlier cases involving application of the *Feres* and *Brooks* doctrines could have been decided on narrower grounds, rejected the irrebuttable presumption approach with respect to the first two elements of the test, stating:

> " . . . [I]f he is on base or on active duty status, a strong presumption is raised that the injury arose out of activities incident to military service, just as the opposite presumption is raised when he is off base and on pass, leave, or furlough. The courts carefully scrutinize the facts in the second situation to determine whether the serviceman was engaged in an activity incident to service, and the same consideration should be given to the facts in the first situation. Neither presumption should be irrebuttable."
>
> *Id.,* slip opinion at p. 13.

The circuit court in *Miller* described three recurring fact situations in which *Feres* would apply to bar the claims:

> " . . . One of the most common fact situations is when a serviceman is injured as a result of negligence of military physicians or military hospital personnel. A second recurring fact situation is when a serviceman is injured while riding on a military vehicle in a nonmilitary capacity pursuant to a privilege to ride free on a stand-by basis. A third situation is where the serviceman is injured while using military recreational facilities. In all three instances, the serviceman is taking advantage of a privilege permitted because of his military status, and the activity is, there-

fore, incident to military service, and the suit would be barred. Even the simple activity of sleeping in the barracks would be incident to service because civilians are generally not permitted to sleep in military barracks or housing. Almost every aspect of a serviceman's life is incident to service, and most claims for injuries sustained by serviceman would be barred by *Feres*. . . ."

*Id.*, slip opinion at pp. 14-16.

The court determined that:

"[t]he *Brooks* rationale should not be limited to those cases where the serviceman is on leave or furlough, but should also be applied in cases where the serviceman is on active duty status but engaged in an activity that is really not related to or dependent upon his military career."

*Id.*, slip opinion at p. 16.

The court looked to the following factors in determining that the presumption arising from the activity occurring on base, during the serviceman's active duty, had been overcome:

(1) The serviceman was off duty;

(2) He was working in a civilian capacity for a private contractor;

(3) He was not taking advantage of a military privilege and was not performing military duties or complying with orders; and

(4) He had permission from his superior officers to work.

The court derived from these factors the following conclusions:

" . . . This work was not something that a serviceman would ordinarily do while off duty. Even though he

was on active duty and on a military base, he was exactly in the same position as any civilian employee of the private contractor might have been at that time and place.

"... The Army 'loaned' him out to a private contractor and, for all practical purposes, temporarily released their jurisdiction and control over him. ... The government takes a risk when it permits the members of the military to engage in outside activities totally unrelated to military life. If the government chooses to 'loan' out the members of its military to civilian government employees, it must bear the risk of liability for resulting injuries. ..."

*Id.*, slip opinion at p. 17.

In the present case Briscoe was on the base at Fort Gordon pursuant to orders but was off duty due to the Memorial Day holiday. While he was free to leave the base at the time of the incidents, he had not done so. This would appear to place Briscoe in a position somewhat similar to that of the serviceman in *Miller*. Thus, according to the court in *Miller*, a strong presumption arises that Briscoe's activity was incident to military service. None of the factors to which the court looked in *Miller* to overcome that strong presumption are present in this case, however. No extra-military relationship was involved here which can be said to have subjected Briscoe to some authority or control other than that of the military. He was not "in the same position" as a civilian with respect to this presence at the base and with respect to his involvement in the incidents. The activity was not "totally unrelated to military life," as it was in *Miller*.

The facts of the present case fall much closer to those in *Feres v. United States*, 340 U.S. 135, where the serviceman was killed when the barracks in which he was

sleeping burned. Briscoe was on the base for the purpose of participating in federally mandated training exercises, and although he was off duty at the time of the mock hanging incident, the activities and incidents involved in the claims are related to Briscoe's military life; they are incident to his military service.

The plaintiff contends that a "but for" test should be applied—that is, the plaintiff argues that since the injuries could have been sustained anywhere or at any time, the injuries were not from activities which are peculiar to military service and therefore were not incident to military service. The plaintiff distinguishes *Feres* on the ground that living in an army barracks is peculiar to military service, in that a serviceman would not be there but for the fact of his military service. Certainly, that fact does not distinguish *Feres* from the present case. There is no indication that Briscoe would have been on the base, involved in an allegedly continuing and perhaps even hostile relationship with other guardsmen, except for his orders to report to Fort Gordon for the annual training exercise. Unlike the situation in *Miller,* Briscoe would have had no purpose for being at Fort Gordon but for his military service. The fact that Briscoe was in off-duty status at the time of the mock hanging incident does not make his activities or these claims unrelated to military service. Moreover, the focus of the plaintiff's arguments appears to be the nature of the causes of the injuries, whereas the court in *Miller* indicates that the focus of the factual inquiry must be on what the serviceman was doing and the nature of his activities. I conclude, therefore, that the motion of the defendants Shields, Siefkes, Thompson and Britton for summary judgment on the

ground that the plaintiff's claims are barred by the doctrine of *Feres v. United States,* 340 U.S. 135, must be granted.

As to the motion of the State of Nebraska Military Department to quash or modify subpoena, filing 73, it is apparent that the passage of time has rendered the motion moot.

Dated February 19, 1981.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DELLA BROWN, Conservator of DAN C. BRISCOE, a protected person,

Plaintiff,

vs.

RONALD L. SMITH, et al,

Defendants.

ORDER

(Filed February 19, 1981)

CV79-L-79

Pursuant to the accompanying memorandum of today,

IT IS ORDERED:

1. That the motion to reconsider the court's ruling on the motion to dismiss for lack of proper venue, filing

66, is granted and the motion to dismiss, filing 25, is granted as to the defendants Leeson and Stackhouse but is denied as to the other defendants named in filing 25;

2. That the motion to dismiss for lack of proper venue, filing 43, is granted as to the defendant Makarski, pursuant to the showing made in filing 71, and paragraph 4 of the order of May 12, 1978, to the contrary, filing 65, is vacated;

3. That the motion for summary judgment of the defendants Shields, Siefkes, Thompson and Britton, contained in filings 57 and 68, is granted and judgment is entered for these defendants on the plaintiff's claims; and

4. That the motion to quash or modify subpoena filing 73, is denied as being moot.

Dated February 19, 1981.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DELLA BROWN, Conservator of DAN C. BRISCOE, a protected person,

Plaintiff,

vs.

RONALD L. SMITH, et al,

Defendants.

## MEMORANDUM

(Filed January 18, 1983)

CV79-L-99

This case and its companion case, *Brown v. United States,* CV79-L-180, concern the alleged violation of Dan Briscoe's constitutional rights during training exercises of the Nebraska National Guard. The plaintiff is Briscoe's mother; she alleges that he was the victim of constant racial harassment and of a mock hanging incident in which a noose was placed around his neck and he was lifted off the ground; that this provoked mental anguish and depression which caused Briscoe to put his hand through a glass window immediately after the hanging incident and several months later to shoot himself in the head. In this action, CV79-L-99, she has filed claims under 42 U.S.C. §§ 1981 and 1983 against individual members of the Nebraska National Guard. Each of the three motions for summary judgment now before me argues that the movants enjoy immunity under *Feres v. United States,* 340 U.S. 135 (1950), and I base my decision on that ground.

I have discussed the *Feres* doctrine in two earlier memoranda in this case. In the first, filing 64, I reserved decision on whether four of the defendants were entitled to immunity under *Feres,* because I did not have enough facts to make a decision. Those defendants subsequently filed another motion for summary judgment, filing 68; after examining the motion and supporting affidavits, and in light of *Miller v. United States,* 643 F.2d 481 (C.A. 8th Cir. 1980), I granted the motion. Filing 77. The remaining defendants filed their motions for summary judgment on June 11, 1982. Filings 89, 90 and 91.

All of the moving defendants were members of the Nebraska National Guard at the time of the incident. Complaint, filing 1; affidavits of Francis Winner and Burl M. Johnson, filings 89 and 92. According to Winner's affidavit and my summary of the undisputed facts in filing 36, the mock hanging incident took place on the premises of Fort Gordon, Georgia. While Briscoe and the defendants were off duty at the time of the incident, they were not on leave status. *Id.* Based on those facts and my reading of *Miller,* supra, I see no reason why these defendants are not entitled to *Feres* immunity also.

The plaintiff has neither filed affidavits opposing the motions nor contested the application of the above facts. The plaintiff's sole argument is that applying intramilitary immunity to cases alleging a deprivation of constitutional rights is unjust. However, the Eighth Circuit Court of Appeals recently held that *Feres'* immunity applies to claims based upon constitutional grounds. *Laswell v. Brown,* 683 F.2d 261, 268-269 (1982). That court admitted that its decision was troubling, and it quoted from *Jaffee v. United States,* 663 F.2d 1226, 1228 (C.A. 3rd Cir. 1981) (en banc), cert. denied, 50 U.S.L.W. 3916 (May 17, 1982), in which the Third Circuit Court of Appeals reached the same conclusion and voiced similar concerns. I, too, am reluctant to dismss the case on these grounds, but I am bound to do so under *Laswell.*

This concludes the action, inasmuch as no part of it has survived. A separate order will be entered, granting the defendants' motion for summary judgment.

Dated January 17, 1983.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DELLA BROWN, Conservator of DAN C. BRISCOE, a protected person,

Plaintiff,

vs.

RONALD L. SMITH, et al,

Defendants.

ORDER

(Filed January 18, 1983)

CV79-L-99

Pursuant to the accompanying memorandum,

IT IS ORDERED:

1. That the motion of Francis Winner for summary judgment, filing 89, is granted;

2. That the motion of the defendants Smith, Johnson, Lopez, Devere, Schultz and Morgan for summary judgment, filing 90, is granted;

3. That the motion of Steven Titus for summary judgment, filing 91, is granted; and

4. That the motion of the defendants Shields, Siefkes, Thompson and Britton for certification, filing 93, is denied for mootness.

Dated January 17, 1983.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DELLA BROWN, Conservator of DAN C. BRISCOE, a protected person,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM

(Filed January 18, 1983)

CV-79-L-180

The United States has filed a motion for summary judgment, filing 18, on the ground that it is entitled to immunity under *Feres v. United States,* 340 U.S. 135 (1950). This motion is based on the same issues and facts presented by several summary judgment motions filed in a companion case, *Brown v. Smith et al,* CV-79-L-99. My memorandum and order of today in that case granted those motions; filing 18 will be granted, for the same reasons.

Dated January 17, 1983.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DELLA BROWN, Conservator of DAN C. BRISCOE,
a protected person,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendants.

ORDER

(Filed January 18, 1983)

CV-79-L-180

Pursuant to the accompanying memorandum,

IT IS ORDERED that the defendant's motion for summary judgment, filing 18, is granted and summary judgment is entered for the defendant.

Dated January 17, 1983.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1983

No. 83-1234

Della Brown, Conservator of
Dan C. Briscoe, a Protected Person,

Appellant,

vs.

United States of America,

Appellee.

No. 83-1242

Della Brown, Conservator of
Dan C. Briscoe, a Protected Person,

Appellant,

vs.

Ronald L. Smith, et al,

Appellees.

Appeal from the United States District Court
for the District of Nebraska

JUDGMENT

(Entered July 20, 1984)

This appeal from the United States District Court was submitted on the record of the said District Court and the briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said district court is hereby affirmed

in part, reversed in part, and remanded for proceedings consistent with the opinion of this Court.

July 20, 1984

A true copy.

Attest:

Robert D. St. Vrain
CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT

8/15/84

No. 84-636

Office-Supreme Court, U.S.
FILED
JAN 25 1985
ALEXANDER L. STEVAS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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DELLA BROWN, CONSERVATOR OF DAN C. BRISCOE,
PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AND RESPONDENTS SIEFKES, SHIELDS, THOMPSON, AND BRITTON IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether the doctrine of *Feres* v. *United States,* 340 U.S. 135 (1950), bars a Federal Tort Claims Act suit against the United States for the alleged failure of military personnel to prevent a tort committed on a military base by off-duty members of the National Guard against another off-duty Guard member.

2. Whether National Guard officers may be sued under 42 U.S.C. 1981 and 1983 for their alleged failure to prevent or properly investigate the tort.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

---

No. 84-636

DELLA BROWN, CONSERVATOR OF DAN C. BRISCOE,
PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AND RESPONDENTS SIEFKES, SHIELDS, THOMPSON, AND BRITTON IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 739 F.2d 362. The memoranda and orders of the district court (Pet. App. 18-36) are unreported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 37-38) was entered on July 20, 1984. The petition for a writ of certiorari was filed on October 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is the mother and conservator of Dan C. Briscoe, a former enlisted member of the Nebraska National Guard. She alleges that Briscoe, who is black, was the

victim of a racially motivated intentional tort. This tort consisted of a "mock lynching" carried out by other National Guard enlisted men while they and Briscoe were participating in federally mandated annual training exercises on a federal military base. It occurred on the base during an afternoon party on a holiday. Petitioner was on nonduty status for the holiday at the time. Pet. App. 3.

The incident was investigated by a National Guard captain, who conducted interviews and took sworn statements from the participants. His report concluded that "the mock hanging took place at a party with excessive drinking, that it was a crude, ill-advised prank, but without intent of bodily harm, and that Briscoe participated in the prank voluntarily and remained at the party drinking after the incident" (Pet. App. 4). The report further stated that Briscoe indicated that he "was not interested in making any formal complaint," and his requests for pay, medical benefits, and an opportunity to discuss the incident with a race relations officer "received prompt attention" (*ibid.*).

Briscoe subsequently became depressed and attempted suicide. The attempt, which occurred in 1977, left him seriously injured. In 1979, petitioner brought suit in the United States District Court for the District of Nebraska. She sought damages from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, alleging that federal military personnel at the base had been negligent in failing to prevent the mock lynching. Petitioner also sought damages from certain of Briscoe's superior officers in the National Guard and fellow enlisted members of the Guard under 42 U.S.C. 1981 and 1983. She claimed that the superior officers were liable for negligence in failing to prevent the incident and in failing properly to investigate the incident, and that the enlisted men were liable for participating in the incident itself. Pet. App. 2-5.

The district court granted summary judgment for all the defendants (Pet. App. 18-35). The court of appeals affirmed in part and reversed in part (*id.* at 1-17). The court of appeals ruled that the FTCA claim against the United States was precluded by the doctrine of *Feres* v. *United States,* 340 U.S. 135 (1950), which held that the government may not be sued by a serviceman under the FTCA for alleged torts incident to military service. The court of appeals explained (Pet. App. 15):

> The claim that various officers negligently failed to prevent the incident directly calls into question the disciplinary decisions of Briscoe's superior officers. Presumably what would be litigated is whether the officers should have issued some type of order, or otherwise taken disciplinary action, to prevent any type of racially motivated actions. Under the *Feres* doctrine such a lawsuit cannot be maintained — it strikes precisely at the type of command relationship between a service member and his or her superior officers that is at the heart of the military disciplinary structure. Similarly, the claim that various officers failed to perform a proper investigation strikes directly at military decisionmaking with respect to a disciplinary matter. The *Feres* doctrine will not permit a court to second-guess the military decisions as to how an investigation into a disciplinary matter should have been conducted.

The court of appeals ruled that the policies underlying the *Feres* doctrine similarly precluded petitioner's statutory claims against the individual superior officers. The court of appeals noted that in *Chappell* v. *Wallace,* 462 U.S. 296 (1982), this Court held that a serviceman has no implied constitutional cause of action for damages against a superior officer (see *Bivens* v. *Six Unknown Named Agents of*

*Federal Bureau of Narcotics,* 403 U.S. 388 (1971)), and reasoned as follows (Pet. App. 10):

> We are unable to find * * * a reasoned distinction for the purposes of the *Feres* doctrine between *Bivens*-type actions under the Constitution and actions brought under a federal civil rights statute. We cannot say that the policies supporting the civil rights statutes are any stronger than those supporting constitutional rights; nor can we say that military discipline will be any less affected by a civil rights claim than a constitutional claim. Hence, we reject [petitioner's] argument that the *Feres* doctrine can never be a bar to a suit brought under 42 U.S.C. §§ 1981 and 1983.

The court of appeals reinstated petitioner's claims against the enlisted men who allegedly participated in the incident. The court explained that "[u]nlike the other two claims, this claim does not involve the command relationship between a service member and his or her superiors, nor does it involve military decisionmaking with respect to disciplinary matters" (Pet. App. 15).

## ARGUMENT

1. In *Shearer* v. *United States,* 723 F.2d 1102 (1983), cert. granted, No. 84-194 (Oct. 29, 1984), the Third Circuit reversed the dismissal of an FTCA suit brought by a deceased serviceman's survivor who alleged that the government negligently failed to prevent another serviceman from murdering the decedent. The murder occurred while both servicemen were off duty and off the base. The Third Circuit rejected the government's arguments that the claim was barred by both the *Feres* doctrine and the intentional tort exception to the FTCA, 28 U.S.C. 2680(h). This Court granted the government's petition for a writ of certiorari in *Shearer* to consider both the *Feres* issue and the interpretation of Section 2680(h).

For purposes of the *Feres* doctrine, petitioner's claim is at best indistinguishable from — and may be weaker than — the claim of the plaintiff in *Shearer*. See 84-194 Pet. 15-16 n.8.[1] Accordingly, for the reasons stated in our brief in *Shearer* (at 24-32),[2] the courts below were correct in holding that petitioner's claim was barred by *Feres*. As the court of appeals explained (Pet. App. 15), petitioner's claim directly challenges the decisions that military personnel made with respect to the supervision and discipline of enlisted men. It therefore implicates the policies that form the basis of the *Feres* doctrine. Consequently, while it is appropriate for the Court to hold the petition pending the decision in *Shearer*, a reversal of the Third Circuit's holding on the *Feres* issue would appear to necessitate the conclusion that the decision of the court below is correct.

Petitioner's claim is also indistinguishable from the claim of the plaintiff in *Shearer* for purposes of the intentional tort exception. Accordingly, for the reasons stated in the portion of our brief in *Shearer* dealing with Section 2680(h), petitioner's claim was barred by the intentional tort exception as well. See 84-194 U.S. Br. 9-24. Section 2680(h) provides that the FTCA "does not apply" to "[a]ny claim

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[1]The only arguably material difference between the claims is that the incident that gave rise to the injury to Briscoe occurred on a military base. While we do not consider this factor to be of any significance in this context — for the reasons stated at pages 30-31 of our brief in *Shearer* — it is possible that this factor would have caused even the Third Circuit to rule that petitioner's claim was barred by *Feres;* in explaining why the *Feres* doctrine did not apply in *Shearer*, the Third Circuit emphasized that the murder occurred off the base. See 723 F.2d at 1105, 1106. For this reason, we do not agree with petitioner's assertion (Pet. 10-11) that the decision below conflicts with the Third Circuit's decision in *Shearer*.

[2]We have served copies of the brief and petition in *Shearer* on counsel for petitioner.

arising out of assault [or] battery"; petitioner's claim "arises out of" the assault and battery committed against Briscoe within the plain meaning of that phrase. Thus, even if this Court reverses in *Shearer* solely on the basis of Section 2680(h) and does not reach the *Feres* issue, petitioner would not be entitled to any relief.[3]

2. The court of appeals' ruling that petitioner cannot seek damages from Briscoe's superior officers under 42 U.S.C. 1981 and 1983 is correct, is unrelated to *Shearer*, and is consistent with the decision of the only other court of appeals that has considered a similar issue. See *Mollnow* v. *Carlton*, 716 F.2d 627, 630-632 (9th Cir. 1983), cert. denied, No. 83-994 (Mar. 19, 1984) (suit under 42 U.S.C. 1985(3)). The petition should accordingly be denied as to Question 2 of the questions presented irrespective of this Court's decision in *Shearer*.

In *Feres*, this Court ruled that the FTCA does not authorize servicemen's suits against the government based on torts committed by fellow servicemen incident to military service. The Court has stated that "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline' " (*United States* v. *Muniz*, 374 U.S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954)). For at least two reasons, the court of appeals' interpretation of Sections 1981 and 1983 follows *a fortiori* from *Feres*.

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[3]Such a disposition of *Shearer* would, by reversing the Third Circuit's judgment, deprive the Third Circuit's decision in *Shearer* of all precedential effect and thereby eliminate any arguable conflict (see page 5 note 1, *supra*) between the Third Circuit and the court below.

First, as this Court remarked in *Feres* (340 U.S. at 138-139), there are indications in the FTCA that Congress contemplated that servicemen would sue the government for torts arising out of military service;[4] there are no comparable indications in Sections 1981 and 1983. Indeed, it is most unlikely that the Reconstruction Era Congress that enacted those statutes envisioned that they would authorize suits by servicemen against their superior officers. Compare *Butz* v. *Economou*, 438 U.S. 478, 500-501, 504 (1978) (principles governing immunity in *Bivens* actions also apply to suits under Section 1983), with *Chappell* v. *Wallace*, *supra* (servicemen may not bring *Bivens* actions against their superior officers). Second, the FTCA permits suits only against the government; petitioner's suit under Sections 1981 and 1983 seeks damages from the individual respondents in their personal capacities — a form of relief much more likely to interfere with the " 'peculiar and special relationship of the soldier to his superiors' " and to have a disruptive " 'effect[] * * * on discipline.' " See *Chappell*, 462 U.S. at 300.

Moreover, it is clear that petitioner's claims under Sections 1981 and 1983 should be dismissed for other reasons. Section 1981 " 'protect[s] a limited category of rights' " (*General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375, 384 (1982), quoting *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966)) that are enumerated in the statute. Petitioner does not suggest any way in which the

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[4]For example, the FTCA specifically includes "members of the military and naval forces" in its definition of "[e]mployee of the government" (28 U.S.C. 2671), thus revealing that Congress expected the torts of military officials to give rise to liability on the part of the United States in some contexts. Moreover, the FTCA contains several express exceptions, including an exception for "combatant activities of the military or naval forces * * * during time of war" (28 U.S.C. 2680(j)), but it contains no express exception for torts committed by one serviceman against another.

wrongs allegedly done to Briscoe by his superiors — the alleged failure to prevent and properly to investigate the mock lynching — are among those enumerated in Section 1981.

Section 1983 provides a cause of action only for a deprivation of a constitutional or statutory right; petitioner's complaint does not suggest that Briscoe was denied any constitutional or statutory right other than a right not to be discriminated against on the basis of race. Section 1981 also requires a showing of intentional racial discrimination. *General Building Contractors Association, Inc.* v. *Pennsylvania, supra.* Thus, petitioner must demonstrate a racially discriminatory motivation in order to prevail under either statute. But while the alleged mock lynching was evidently racially motivated in some sense, there is no basis for believing that any failure to prevent or to investigate that incident was itself based on a racially discriminatory intent. At least in these circumstances, the bare allegations of racial motivation in petitioner's complaint (at paras. 10, 15) are insufficient to require the individual respondents to face discovery and a trial. See, *e.g., Hobson* v. *Wilson,* 737 F.2d 1, 29-31 (D.C. Cir. 1984) (citing *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982)), petition for cert. pending, No. 84-1139 (filed Jan. 14, 1985).

## CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be disposed of as appropriate in light of the Court's decision in *United States* v. *Shearer*, No. 84-194. As to the second question presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Attorneys*

JANUARY 1985

DOJ-1985-01